

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

TRACY R REES
Claimant

APPEAL NO. 06A-UI-09251-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

COMMUNITY CARE INC
Employer

**OC: 09/06/06 R: 04
Claimant: Appellant (2)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Tracy Rees filed a timely appeal from the September 6, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 2, 2006. Ms. Rees did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Carol Wells, Human Resources Director, represented the employer and presented additional testimony through Lynee Stortz, Assistant Director of Supported Community Living (SCL), Jessie Kearns, SCL Supervisor, and Lisa Wenzel, SCL Director. Employer's Exhibits One through Eight were received into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment.
Whether the final incident that prompted the discharge constituted a current act.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Tracy Rees was employed by Community Care Incorporated (CCI) as a full-time Supported Community Living (SCL) worker from January 26, 2005 until August 14, 2006, when Ben Wright, Executive Director, and Leann Moskowitz, Associate Director, discharged her. The employer provides community based daily living skills assistance and guidance to mentally ill clients. Ms. Rees' immediate supervisor was SCL Supervisor Jesse Kearns.

The final incident that prompted the discharge occurred on August 3 and came to the employer's attention the same day. On August 3, Ms. Rees failed to give a client his prescribed psychotropic medication. The client was a resident of the employer's 24-hour house and depended on the psychotropic medication to remain mentally stable. The client had been in a hurry to leave for work and in the rush Ms. Rees forgot to dispense the medication. Ms. Rees' failure to dispense the medication initially came to the attention of SCL Supervisor Jesse Kearns. Ms. Kearns notified Lynee Stortz, SCL Assistant Director and Ms. Stortz notified SCL Director Lisa Wenzel. On August 4, Ms. Kearns interviewed Ms. Rees regarding the incident and Ms. Rees admitted to forgetting to dispense the medication and completed a medication error document. No further investigation of the matter occurred after August 4. On August 4,

Ms. Stortz left messages for Associate Director Leann Moskowitz, who was out of the office for a few days. The employer did not notify Ms. Rees that the August 3 medication error subjected her to discharge until August 14, the date of the discharge. Ms. Rees had received reprimands and warnings in connection with prior incidents.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether

the conduct that prompted the discharge constituted a “current act,” the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party’s power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party’s case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The evidence established that Ms. Rees was negligent in performing an essential component of her duties on August 3 by failing to provide the consumer his psychotropic medication. However, the evidence in the record fails to establish a “current act” of misconduct that might serve as a basis for disqualifying Ms. Rees for unemployment insurance benefits. See 871 IAC 24.32(8). The conduct that prompted the discharge occurred on August 3. The conduct came to the attention of the employer on August 3 or 4. The employer did not notify Ms. Rees that the conduct subjected her to possible discharge until August 14. The employer has failed to provide a reasonable basis for the 10-11 day delay between its initial knowledge of the August 3 incident and its notification of Ms. Rees. Though the decision to discharge Ms. Rees was within the discretion of the employer, the administrative law judge concludes that Ms. Rees was discharged for no disqualifying reason. Accordingly, Ms. Rees is eligible for benefits, provided she is otherwise eligible. The employer’s account may be charged for benefits paid to Rees. Because the evidence fails to indicate a “current act,” the administrative law judge need not consider whether Ms. Rees’ negligence and/or carelessness was sufficiently recurrent to indicate a willful or wanton disregard of the employer’s interests.

DECISION:

The Agency representative’s September 6, 2006, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer’s account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs